STATE OF MICHIGAN

COURT OF APPEALS

KENISA BARKAI,

Plaintiff-Appellee,

v

VHS OF MICHIGAN, INC., doing business as DETROIT MEDICAL CENTER,

Defendant-Appellant.

UNPUBLISHED
August 12, 2021

No. 354587
Wayne Circuit Court
LC No. 20-005513-CD

JEFFREY EICHENLAUB, CATHERINE GAUGHAN, SALAH HADWAN, ANTHONY BONNETT, and MATTHEW MCLAUGHLIN,

Plaintiffs-Appellees,

v

VHS OF MICHIGAN, INC., doing business as DETROIT MEDICAL CENTER, and TENET HEALTHCARE, INC.,

Defendants-Appellants.

No. 355607
Wayne Circuit Court
LC No. 20-007330-CD

Before: LETICA, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

In Docket No. 354587, defendant, VHS of Michigan, Inc., doing business as Detroit Medical Center (DMC), appeals as of right the trial court's order denying its motion for summary disposition and to compel arbitration. In Docket No. 355607, defendants DMC and Tenet Healthcare, Inc., appeal as of right the trial court's order denying their motion for summary disposition and to compel arbitration. We reverse and remand in both cases.

I. FACTUAL BACKGROUND

These cases arise out of the terminations of plaintiffs, who were all employed at DMC's Sinai-Grace Hospital in Detroit, Michigan. At one time or another, each plaintiff agreed to the Fair Treatment Process (FTP). In June 2014, Tenet revised the FTP and required all then-employed employees to undergo a training on the updated FTP. As part of the training, the employees would acknowledge the terms of the FTP and agree to abide by those terms. Jeffrey Eichenlaub completed the training on June 17, 2014, and Catherine Gaughan completed the training on July 26, 2014. The employees hired after June 2014, as part of their pre-employment training, were asked to sign a document with two acknowledgements: an acknowledgement for receipt of the employee handbook and an acknowledgement for receipt and agreement to the FTP. Anthony Bonnett signed the document on June 16, 2016, Matthew McLaughlin signed on July 24, 2017, and Salah Hadwan signed on November 27, 2017.

Tenet again revised the FTP in January 2019 and DMC's employees were required to complete an electronic assignment that automatically opened the revised FTP. Completion of the assignment also required the employees to agree to the revised FTP. McLaughlin completed the assignment on January 24, 2019, Gaughan, on January 28, 2019, Eichenlaub, on January 31, 2019, Hadwan, on February 4, 2019, and Bonnett, on February 10, 2019. On August 16, 2019, Kenisa Barkai was offered a job at DMC. The offer of employment required Barkai to sign the FTP, which she did on September 9, 2019.

Several provisions of the FTP are relevant to this appeal.[1] Regarding the FTP's applicability and coverage:

> The FTP applies to all employees, regardless of length of service or status, and the agreement to arbitrate covers all disputes relating to or arising out of an employee's employment with the Company or the termination of employment. The only disputes or claims not covered by the FTP are those listed in the Exclusions section below. Examples of the type of disputes or claims covered by the FTP and the arbitration agreement include, but are not limited to, claims for wrongful termination of employment, breach of contract, employment discrimination, harassment or retaliation under the Americans With Disabilities Act, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964 and its amendments or any state or local discrimination laws, tort claims or any other legal claims and causes of action recognized by local, state or federal law or regulations. This is a mutual agreement to arbitrate claims which means that both the employee and the Company are bound to use the FTP process as the only means of resolving employment-related disputes, and thereby agree to forego any right they each may have had to a jury trial on issues covered by the FTP. However, no

[1] We note that the version of the FTP that was part of the electronic assignment is different from the version supplied to Barkai in style and organization only. The substantive terms of the FTP are consistent between the two.

> remedies that otherwise would be available to either party in a court of law will be forfeited by virtue of their agreement to use and be bound by the FTP.

The FTP then describes the steps of the fair treatment process, with the first step being an internal review followed by final and binding arbitration. As mentioned in the applicability and coverage section, the FTP excludes certain issues from arbitration:

> Workers' Compensation Claims, any claim involving the construction or application of a benefit plan covered by ERISA, and claims for unemployment benefits are excluded from the FTP. In addition, any non-waivable statutory claims, which may include claims within the jurisdiction of the National Labor Relations Board, wage claims within the jurisdiction of a local or state labor commissioner, or administrative agency charges before the Equal Employment Opportunity Commission or similar local or state agencies, are not subject to exclusive review under the FTP. This means that employees may file such non-waivable statutory claims with the appropriate agency that has jurisdiction over them if they wish, regardless of whether they decide to use the FTP to resolve them. However, if such agency completes its processing of an employee's claim and the employee decides to pursue further remedies on such claims in a civil action against the Company, the employee must use the FTP (although [the internal review] may be skipped). In addition, the FTP does not apply to employees covered by a collective bargaining agreement, unless otherwise agreed to by such employees.

Finally, the FTP contained a number of sections under the heading "Other Important Information," including:

> Applicable Law and Procedural Rules: The Federal Arbitration Act, 9 U.S.C. § 1, *et seq*., will govern arbitrations under the FTP. The applicable Employment Arbitration Rules of the AAA will govern the procedures to be used in such arbitrations, unless the parties have agreed otherwise.
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> * * *
>
> At-Will Employment: Nothing in the FTP shall be construed to create a contract of employment, express or implied, nor does the FTP in any way alter the at-will nature of the employment relationship between the Company and its employees.
>
> Modification to the FTP: The Company will not modify or change the agreement between the Company and its employees to use final and binding arbitration to resolve employment-related disputes, without notifying and obtaining the consent of employees to such changes. However, the Company may change or modify the FTP procedures from time-to-time without advance notice and without the consent of employees. To the extent permitted by applicable law, your consent to any such modifications will be implied by your continued employment after advance notice of any such modifications.

Bonnett, McLaughlin, Hadwan, and Barkai also signed acknowledgement documents that stated:

> I acknowledge that I have reviewed the Fair Treatment Process above. Except to the extent that any applicable collective bargaining agreement provides otherwise, I hereby voluntarily agree to use the Fair Treatment Process and to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenet as set forth above.[2] I understand that final and binding arbitration will be the sole and exclusive remedy for any such claims or disputes that I may have against Tenet or its parent, subsidiary or affiliated companies or entities, and each of its and/or their employees, officers, directors or agents, and, that to the extent permitted by law, I may not join any such claim or dispute with the dispute of another employee in a class, collective, representative or group action. Arbitration under the Fair Treatment Process is limited to individual disputes, claims or controversies that a court of law would be authorized or have jurisdiction over to grant relief, and by agreeing to the use of arbitration to resolve my dispute, both the Company and I agree to forego any right we each may have had to a jury trial on issues covered by the Fair Treatment Process. I also agree that such arbitration will be conducted before an experienced arbitrator chosen by me and the Company, and will be conducted under the Federal Arbitration Act and the procedural rules of the American Arbitration Association ("AAA") unless the Company and I agree otherwise.
>
> I further acknowledge that in exchange for my agreement to arbitrate, the Company also agrees to submit all claims and disputes it may have with me to final and binding arbitration . . . . I further acknowledge that this mutual agreement to arbitrate may not be modified or rescinded except in writing by both me and the Company.

Plaintiffs were employed by DMC during the COVID-19 pandemic; Barkai, Eichenlaub, Hadwan, and Bonnett were nurses, Guaghan was a clinical coordinator, and McLaughlin was an emergency room technician. Each plaintiff had a conversation with managers at DMC and expressed their concerns over the hospital's lack of personal protective equipment (PPE) and the patients' conditions.

On March 17, 2020, Barkai "posted a 7-second video on social media showing herself wearing PPE, including a mask, face shield, and gloves while stating 'I have my gloves, my hair covering, my mask, my gown and I'm read to rock and roll. I'm going in.' " The next day, Barkai

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[2] We note that the version of the document that Bonnett, McLaughlin, and Hadwan signed was an earlier version compared to the document that Barkai signed. The versions are nearly identical, although the earlier version does contain a provision that the agreement to arbitrate did not include "certain specific Excluded or Restricted issues outlined in the Fair Treatment Process, including the filing of a charge with the National Labor Relations Board." In all other respects, the documents are substantively identical.

was interviewed for the local news and reiterated her concerns about patient and staff safety caused by the shortage of PPE. On March 27, 2020, DMC terminated Barkai's employment for violating its social-media policy.

On April 14, 2020, a national news agency published a story with two pictures depicting dead bodies in body bags "piled on top of each other . . . ." A corporate officer for Tenet met with the remaining plaintiffs about the origin of the photographs. Each plaintiff denied taking the photographs or sending them to the news agency, but DMC terminated their employment.

In Docket No. 354587, Barkai filed a complaint against DMC alleging retaliation in violation of The Whistleblowers' Protection Act (WPA), MCL 15.369 *et seq*., and wrongful discharge in violation of public policy. In Docket No. 355607, Eichenlaub, Gaughan, Hadwan, Bonnett, and McLaughlin filed a complaint alleging retaliation in violation of the WPA against DMC, wrongful discharge in violation of public policy against DMC, intentional or reckless infliction of emotional distress against DMC, and conspiracy to intentionally or recklessly inflict emotional distress against DMC and Tenet. In both cases, defendants filed a motion for summary disposition under MCR 2.116(C)(7), arguing that the cases should be dismissed because the FTP that each plaintiff had agreed to contained an arbitration agreement. Plaintiffs denied that there was a valid arbitration agreement and argued that even if the FTP had a valid arbitration agreement, the text of the FTP did not require claims under the WPA to be arbitrated.

In both cases, the trial court denied defendants' motions for summary disposition. In Docket No. 354587, the trial court "disagree[d] that mandatory arbitration must be compelled." In Docket No. 355607, the trial court determined that the "employee handbook does not constitute a binding agreement to arbitrate these claims." This appeal followed.

II. DISCUSSION

In Docket Nos. 354587 and 355607, defendants argue that the trial court erred by determining that there was not a binding arbitration agreement between the parties. Defendants also argue that the FTP encompassed plaintiffs' statutory WPA claims and nonstatutory claims of wrongful discharge, intentional or reckless infliction of emotional distress, and conspiracy to intentionally or recklessly inflict emotion distress. We agree.

A. STANDARDS OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(7). Under MCR 2.116(C)(7), summary disposition is appropriate if a claim is barred because of an agreement to arbitrate . . . ." *Beck v Park West Galleries, Inc*, 499 Mich 40, 45; 878 NW2d 804 (2016) (quotation marks and citation omitted; alteration in original). When analyzing a motion for summary disposition under MCR 2.116(C)(7), the trial court must accept as true the contents of the complaint unless contradicted by affidavits, depositions, admissions, or other documentary evidence submitted to the trial court by the moving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Neither the movant nor the responding party, however, is required to file supporting documents under MCR 2.116(C)(7). *Id*.

Additionally, "[w]hether an issue is subject to arbitration is also reviewed de novo." *Beck*, 499 Mich at 45. This Court also reviews de novo whether particular circumstances establish a

waiver of the right to arbitration. *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001). "Whether one has waived his right to arbitration depends on the particular facts and circumstances of each case." *Id*. A trial court's factual determinations regarding such circumstances are reviewed for clear error. *Id*. "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made." *McNamara v Horner*, 249 Mich App 177, 182-183; 642 NW2d 385 (2002). Finally, "questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

B. JURISDICTIONAL CHALLENGE

Plaintiffs argue that this Court does not have jurisdiction over defendants' appeals because MCL 691.1708 does not provide for an appeal by right.[3] This Court determines de novo whether it has jurisdiction over an appeal. *Wardell v Hincka*, 297 Mich App 127, 131; 822 NW2d 278 (2012).

Under the Uniform Arbitration Act (UAA), MCL 691.1681 *et seq.*, the section governing appeals, MCL 691.1708, reads:

> (1) An appeal may be taken from any of the following:
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> (a) An order denying a motion to compel arbitration.
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> (b) An order granting a motion to stay arbitration.
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> (c) An order confirming or denying confirmation of an award.
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> (d) An order modifying or correcting an award.
>
> (e) An order vacating an award without directing a rehearing.
>
> (f) A final judgment entered under this act.
>
> (2) An appeal under this section shall be taken as from an order or a judgment in a civil action.

The statute specifies that an appeal may be taken from an order denying a motion to compel arbitration, but it does not specify that the appeal is an appeal of right. But plaintiffs' construction of the statute would essentially render MCL 691.1708(1) surplusage. See *Duffy v Mich Dep't of Natural Resources*, 490 Mich 198, 215; 805 NW2d 399 (2011) (quotation marks and citation omitted) ("[W]e should avoid a construction that would render any part of the statute surplusage

[3] Barkai has already raised this issue in Docket No. 354587 in a motion to dismiss, which this Court denied. *Barkai v VHS of Mich, Inc*, unpublished order of the Court of Appeals, entered September 25, 2020 (Docket No. 354587). In Docket No. 355607, plaintiffs did not file a motion to dismiss on this jurisdictional issue, but instead raised the same issue in their brief on appeal.

or nugatory."). Any of the circuit court orders specified in MCL 691.1708(1) would be appealable by application even without the statute. For the statute to have any meaning, it must be providing an appeal that does not otherwise exist—an appeal as of right. Moreover, even if we accepted plaintiffs' argument, in the interest of judicial economy, we would treat the appeal as an application for leave, grant leave, and address the substantive issues. *In re Ballard*, 323 Mich App 233, 235 n 1; 916 NW2d 841 (2018).

C. APPLICABILITY OF THE FEDERAL ARBITRATION ACT

Defendants argue that the Federal Arbitration Act (FAA), 9 USC 1 *et seq*., is the applicable law that governs the arbitrability of plaintiffs' claims. We need not determine this issue.

We note that in Docket No. 355607, defendants acknowledge that "it ultimately matters not whether the FAA controls as the outcome would be the same regardless of which law controls because the applicable Michigan law on arbitration is consistent with federal law under the FAA." While "[s]tate courts are bound, under the Supremacy Clause, US Const, art VI, cl 2, to enforce the FAA's substantive provisions," *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 498; 591 NW2d 364 (1998), "state laws governing contracts in general do not conflict with the FAA simply because they also affect arbitration contracts," *id*., at 501 n 7. Under the FAA and Michigan's UAA, an agreement to arbitrate is valid except on grounds that would revoke a contract. Compare 9 USC 2 (stating that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,") with MCL 691.1686(1) (stating that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

Further, our caselaw has applied the same three-part test for determining whether a claim is arbitrable in a case involving the FAA and a case not involving the FAA. In *DeCaminada*, 232 Mich App at 496-499, this Court determined that the FAA applied and stated, "To ascertain the arbitrability of an issue, a court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract." Similarly, in *In re Nestorovski Estate*, 283 Mich App 177, 201-202; 769 NW2d 720 (2009) (quotation marks and citation omitted), this Court determined that the parties conducted a common-law arbitration and applied the same three-part test as *DeCaminada*: "1) is there an arbitration agreement in a contract between the parties; 2) is the disputed issue on its face or arguably within the contract's arbitration clause; and 3) is the dispute expressly exempted from arbitration by the terms of the contract." Because the FAA and Michigan law utilize the same test for determining the arbitrability of an issue, we need not determine whether the FAA or the UAA governs.

D. ARBITRABILITY OF CLAIMS

Defendants argue that the parties entered into a valid arbitration agreement that required plaintiffs to arbitrate their statutory and nonstatutory claims. We agree.

This Court has articulated a three-part test for determining whether an issue is arbitrable:

> 1) is there an arbitration agreement in a contract between the parties; 2) is the disputed issue on its face or arguably within the contract's arbitration clause; and 3) is the dispute expressly exempted from arbitration by the terms of the contract? [*In re Nestorovski Estate*, 283 Mich App at 202 (quotation marks and citation omitted).]

"Any doubts about the arbitrability of an issue should be resolved in favor of arbitration." *Id*. at 203 (quotation marks and citation omitted). But "[a] party cannot be required to arbitrate an issue which [s]he has not agreed to submit to arbitration." *Beck*, 499 Mich at 46 (quotation marks and citation omitted; first alteration in original).

Plaintiffs rely on *Heurtebise v Reliable Business Computers*, 452 Mich 405; 550 NW2d 243 (1996), and *Stewart v Fairlane Community Mental Health Ctr (On Remand)*, 225 Mich App 410; 571 NW2d 542 (1997), to argue that there was no valid arbitration agreement between the parties.

In *Heurtebise*, 452 Mich at 408, the plaintiff filed suit against the defendant for unlawfully terminating her employment on the basis of gender discrimination. The defendant argued that the plaintiff signed an acknowledgement that stated she had received the defendant's employee handbook and agreed to be bound by its terms and policies, including binding arbitration. *Id*. at 409. The relevant portion of the handbook provided:

> This document is intended to establish and clarify certain employment policies, practices, rules and regulations (hereinafter collectively referred to as "Policies") of Reliable Business Computers, Inc., (hereinafter referred to as the "company"). Except as may otherwise be provided, the Policies will apply to all company employees, and it is each employee's responsibility to assure that his/her own conduct is in conformity with those Policies. *It is important to recognize and clarify that the Policies specified herein do not create any employment or personal contract, express or implied*, nor is it intended nor expected that the information provided in this document will provide sufficient detail to answer any and all questions which may arise. *NOTWITHSTANDING ANY OF THE SPECIFIC POLICIES HEREIN, EACH EMPLOYEE HAS THE ABSOLUTE RIGHT TO TERMINATE HIS/HER OWN EMPLOYMENT AT ANY TIME, WITHOUT NOTICE, AND FOR ANY REASON WHATSOEVER, AND THE COMPANY HAS THE SAME RIGHT*.
>
> From time to time, the company specifically reserves the right, and may make modifications to any or all of the Policies herein, at its sole discretion, and as future conditions may warrant. In the event employees have any questions relative to any of the Policies, they are urged to contact their supervisor for clarification purposes. [*Id*. at 413.]

The Court determined that the opening statement in the employee handbook "demonstrate[d] that the defendant did not intend to be bound by any provision contained in the handbook." *Id*. at 414. Therefore, there was not an enforceable arbitration agreement between the parties. *Id*.

In *Stewart*, 225 Mich App at 411, 414, the plaintiff, a nurse, was suspended from her work at the defendant's outpatient psychiatric facility because she refused to follow her supervisor's order to prepare medicine for a patient—an act that she considered to be unlawfully dispensing prescription medicine. The plaintiff "considered herself constructively discharged" when the defendant did not allow her to return to work without disciplinary conditions. *Id*. at 414. The plaintiff filed a complaint for a violation of the WPA and the defendant moved for summary disposition to enforce a binding arbitration agreement in the defendant's personnel manual. *Id*. The trial court denied the motion because the arbitration agreement did not apply to the statutory WPA claim. *Id*. at 414-415.

On appeal, this Court utilized our Supreme Court's framework in *Heurtebise* to determine that there was no enforceable arbitration agreement. *Id*. at 417-420. The Court considered the acknowledgement form that the plaintiff signed which "contained, in bold-faced type, the words "Not a Contract of Employment' and specifically stated that the manual is neither an 'employment agreement' nor a 'contract of employment.' The acknowledgment also noted that the personnel policies may be amended from time to time." *Id*. at 420. These statements evidenced that the defendant did not intend to be bound to any provision in the manual, including the arbitration agreement. *Id*.

In this case, although the FTP contains statements similar to those found in *Stewart* and *Heurtebise*, the FTP repeatedly states the arbitration portion of the agreement is binding on plaintiffs *and* defendants. On the first page of the FTP, it states the agreement was "a mutual agreement to arbitrate claims," meaning that "both the employee *and* the Company are bound to use the FTP process as the only means of resolving employment-related disputes . . . ." These statements evidence defendants' intent to be bound by the provisions of the FTP, including the agreement to arbitrate. Additionally, the acknowledgement document that Barkai, Bonnett, Hadwan, and McLaughlin each signed states multiple times that the FTP contains an agreement to arbitrate. See *Heurtebise*, 452 Mich at 414; *Stewart*, 225 Mich App at 420. Further, unlike in *Heurtebise*, defendants could not unilaterally modify or change the parties' agreement because the FTP provided: "[Defendants] will not modify or change the agreement between [defendants] and its employees to use final and binding arbitration to resolve employment-related disputes." Moreover, *Stewart* and *Heurtebise* both relied on a provision of the Michigan Arbitration Act, MCL 600.5011, which was repealed by 2012 PA 370, effective July 1, 2013. See *Heurtebise*, 452 Mich at 411 n 5, citing MCL 600.5011 ("Assuming arguendo that the Michigan Arbitration Act applies, it provides that neither party to an arbitration agreement can revoke the agreement without the other party's consent."); *Stewart*, 225 Mich App at 420-421 (citations and footnote omitted) ("Under the Michigan arbitration act, neither party to an arbitration agreement can revoke the agreement without the other party's consent, which is contrary to the defendant's reserving its right to change its employment policies at any time."). See also MCL 600.5011, repealed by 2012 PA 370 ("Neither party shall have power to revoke any agreement or submission made as provided in this chapter without the consent of the other party[.]"). There is no similar provision in the UAA. See generally MCL 691.1681 through MCL 691.1713. Regardless, the relevant provisions in the FTP establish that defendants intended to be bound by the FTP, which is distinguishable from the facts of *Heurtebise* and *Stewart*.

Plaintiffs also argue that this case is similar to *Heurtebise* and *Stewart* because of the FTP's provision that the FTP did not create a contract of employment. But the statement "[n]othing in

the FTP shall be construed to create a contract of employment, express or implied," is intended only to clarify the status of the employees as at-will employees. In fact, that statement is found within the subsection entitled, "At-Will Employment," and is followed by the statement the FTP does not "in any way alter the at-will nature of the employment relationship between the Company and its employees." Thus, these provisions can be read collectively to demonstrate plaintiffs agreed to be at-will employees who, along with defendants, were bound to arbitrate nearly any employment-related dispute.

Having concluded a valid and enforceable arbitration agreement exists between plaintiffs and defendants, the next considerations are whether "the disputed issue [is] on its face or arguably within the contract's arbitration clause" and whether "the dispute [is] expressly exempted from arbitration by the terms of the contract[.]" *In re Nestorovski Estate*, 283 Mich App at 203. "Generally, the parties' agreement determines the scope of arbitration." *Rooyaker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 163; 742 NW2d 409 (2007). Disputes should be resolved in favor of arbitration. *Id*.

The WPA retaliation claims brought by plaintiffs are "arguably within the parties' arbitration agreement." *In re Nestorovski*, 283 Mich App at 203. The "Applicability and Coverage" section of the FTP and arbitration agreement provides:

> The FTP applies to all employees, regardless of length of service or status, and *the agreement to arbitrate covers all disputes relating to or arising out of an employee's employment with the Company or the termination of employment*. *The only disputes or claims not covered by the FTP are those listed in the Exclusions section below*. Examples of the type of disputes or claims covered by the FTP and the arbitration agreement *include, but are not limited to*, claims for wrongful termination of employment, breach of contract, employment discrimination, harassment or retaliation under the Americans With Disabilities Act, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964 and its amendments or any state or local discrimination laws, tort claims *or any other legal claims and causes of action recognized by local, state or federal law or regulations. This is a mutual agreement to arbitrate claims which means that both the employee and the Company are bound to use the FTP process as the only means of resolving employment-related disputes, and thereby agree to forego any right they each may have had to a jury trial on issues covered by the FTP*. [Emphasis added.]

On the final page of the FTP and mutual arbitration agreement, under the "Agreement to Use FTP Process and Mutual Arbitration," Barkai agreed to "submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with Tenet as set forth above." In their FTP acknowledgment forms, Bonnett, Hadwan, and McLaughlin agreed to similar language as Barkai. And, all of the plaintiffs in Docket No. 355607 completed and received a score of "100" on their training related to the FTP. To complete that training, each of them was required to review the revised FTP.

Plaintiffs' main argument is that their WPA claims are not required to be arbitrated because the arbitration agreement does not specifically state that WPA claims must be arbitrated. Although

the arbitration agreement does not explicitly reference the WPA, the agreement covers "any and all claims and disputes that are related in any way to my employment or the termination of my employment . . . ." At the beginning of the agreement, it states "the agreement to arbitrate covers all disputes relating to or arising out of an employee's employment with the Company or the termination of employment." The WPA "establish[es] a cause of action for an employee who has suffered *an adverse employment action* for reporting or being about to report a violation or suspected violation of the law." *Whitman v City of Burton*, 493 Mich 303, 312; 831 NW2d 223 (2013) (emphasis added). The WPA's objective clearly concerns an employee's activity that occurred taken during the course of employment and the employer's adverse action. Therefore, a WPA claim is covered by the arbitration agreement.

The FTP also lists "[e]xamples of the type of disputes or claims covered by the FTP and the arbitration agreement," concluding with the statement, "or any other legal claims and causes of action recognized by local, state or federal law or regulations." Although a retaliation claim in violation of the WPA is not specifically listed, it is clearly a cause of action recognized by state law. See MCL 15.361 *et seq*.

Further, the FTP states that the "only disputes or claims not covered by the FTP are those listed in the Exclusions section below." The Exclusion section provides that the excluded claims are:

> Workers' Compensation Claims, any claim involving the construction or application of a benefit plan covered by ERISA, and claims for unemployment benefits are excluded from the FTP. In addition, any non-waivable statutory claims, which may include claims within the jurisdiction of the National Labor Relations Board, wage claims within the jurisdiction of a local or state labor commissioner, or administrative agency charges before the Equal Employment Opportunity Commission or similar local or state agencies, are not subject to exclusive review under the FTP.

A WPA claim is not listed, and, therefore, not excluded from arbitration under the FTP. See *In re Nestorovski*, 283 Mich App at 203.

Because the agreement's coverage is broad, and its list of claims is nonexhaustive, the WPA claim falls under it. Moreover, the WPA claim is not expressly exempted under the terms of the agreement. Therefore, the WPA claim must be arbitrated. See *Rooyakker & Sitz, PLLC*, 276 Mich App at 146 (holding that the "broad language of the arbitration clause—'any dispute or controversy arising out of or relating to' the agreement—vest[ed]" the arbitrator with the authority to consider tortious interference and defamation claims, "even if they involve nonparties to the agreement.").[4] As a result, the trial court in both cases erred by determining that mandatory arbitration for the WPA claims was not required.

[4] We note that plaintiffs argue that *Vanderlaan, MD v Mich Med, PC*, unpublished per curiam opinion of the Court of Appeals, issued July 9, 2009 (Docket No. 284678), prevents arbitration of

Turning to plaintiffs' nonstatutory claims, plaintiffs note that their claims for wrongful termination in violation of public policy were pleaded in the alternative to their WPA claims. Indeed, such claims could only be viable if the WPA claims fail. See *Anzaldua v Neogen Corp*, 292 Mich App 626, 631; 808 NW2d 804 (2011) (citations omitted) ("The WPA provides the exclusive remedy for such retaliatory discharge and consequently preempts common-law public-policy claims arising from the same activity. However, if the WPA does not apply, it provides no remedy and there is no preemption."). Even so, as with their respective retaliation claims under the WPA, the claims for wrongful discharge against public policy by plaintiffs are clearly related to the termination of their employment, and, therefore, come within the coverage of the FTP and arbitration agreement. And because the arbitration agreement does not exclude these issues, plaintiffs' claims for wrongful termination against public policy must be arbitrated.

The same is true for plaintiffs' claims of intentional infliction of emotional distress and conspiracy to commit intentional infliction of emotional distress in Docket No. 355607. Both claims involved allegations related to conditions at DMC during the COVID-19 pandemic and plaintiffs' experiences during that pandemic while they were employed by defendants. Thus, the claims for intentional infliction of emotional distress and conspiracy to commit intentional infliction of emotional distress relate to their employment with defendants and are encompassed within the FTP and subject to mandatory arbitration. Further, the arbitration agreement does not exclude these claims from the scope of the agreement. Accordingly, the trial court in Docket No.

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issues that are not specifically mentioned in an arbitration agreement and that general provisions of arbitrability, such as the provisions of the FTP mentioned, are insufficient to show that a person agreed to arbitrate the issues. Unpublished opinions are not binding, but may be considered persuasive. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). We do not find *Vanderlaan* persuasive in this case because the "catchall" provision in this case is more specific than the one in *Vanderlaan*. See *Vanderlaan*, unpub op at 3 (footnote omitted) ("The language '*any dispute between Employer and Employee arising under or relating in any manner to this Agreement*,' is general. While the language could be construed to mean any dispute relating in any way to [the] plaintiff's employment with [the] defendants, it could also be construed to mean that it pertained solely to disputes relating in any way to the terms of the agreement. The agreement dealt primarily with terms of employment such as compensation, benefits, duties, and termination for cause. There was no mention of a Whistleblower claim in this employment agreement. The document itself lacked any language addressing the WPA. The language did not constitute a 'clear and unmistakable' waiver of the right to bring a statutory WPA claim in court."). The catchall provisions in this case are sufficiently distinguishable because they narrow the arbitrable issues to those "relating to or arising out of an employee's employment . . . or the termination of employment," or claims recognized by state law. As discussed, the WPA claims clearly arise from plaintiffs' employment and termination of employment, and are recognized by state law.

355607 erred when it denied defendants' motion for summary disposition and to compel arbitration and failed to mandate arbitration of the claims of intentional infliction of emotional distress and conspiracy to commit intentional infliction of emotional distress.

In both Docket Nos. 354587 and 355607, we reverse the orders denying defendants' motions for summary disposition and remand for entry of an order compelling arbitration. We do not retain jurisdiction.

/s/ Anica Letica
/s/ Deborah A. Servitto
/s/ Michael J. Kelly